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Advantages to International Satellite Organizations

This chapter responds to the reporting requirements in Section 6 (7) of the IAFCA which requests information on advantages, in terms of immunities, market access, or otherwise, enjoyed by the international satellite organizations (ISOs), the International Telecommunications Satellite Organization (INTELSAT), and the International Mobile Satellite Organization (Inmarsat), the reason for such advantages, and an assessment of progress toward fulfilling the policy described in Section 5 of the IAFCA. It was prepared by the National Telecommunications and Information Administration (NTIA) of the U.S. Department of Commerce.

INTELSAT is a treaty-based global communications satellite cooperative with 143 member countries. INTELSAT was created to enhance global communications and to spread the risks of creating a global satellite system across telephone operating companies from many countries. Inmarsat was created to improve the global maritime communications satellite system that would provide distress, safety, and communications services to seafaring nations in a cooperative, cost-sharing entity. Comsat Corporation (Comsat) is the U.S. signatory to INTELSAT (and was formerly the signatory to Inmarsat**)** participating in the commercial operations of this international satellite organization.

To assist in the preparation of this report, NTIA issued a Request for Comments in the April 12, 1999, *Federal Register*.[1] NTIA sought views of all interested parties through this notice. The comments received are posted on NTIA's website. With the cooperation of the State Department, requests were sent to U.S. embassies seeking information on "favorable treatment" to INTELSAT and/or Inmarsat. NTIA considered all the above information in preparing its analysis.

In the time between passage of IAFCA and preparation of this report, Inmarsat completed its privatization process. As a result of privatization, the executive branch no longer conducts oversight of Inmarsat acting through Comsat. Consequently, INTELSAT is the focus of this report. INTELSAT states that it is taking steps toward "procompetitive privatization" and that it expects full privatization by 2001. Chapter 7 reviews antibribery programs and transparency with respect to INTELSAT and several other international organizations. Issues involving INTELSAT procurement decisions, audit procedures, and staff ethics are discussed in that chapter.

Privileges and Immunities

INTELSAT and its signatories, when acting in the INTELSAT context, benefit from the unique advantage of access to privileges and immunities. While these privileges and immunities have provided INTELSAT and its signatories some commercial advantages—freedom from

antitrust action and freedom from taxation of INTELSAT itself— these privileges and immunities were probably necessary to spur development and deployment of international satellite telecommunications. First, when INTELSAT was created there was no experience with international telecommunications by satellite and no assurance that a successful commercial venture might result. Considerable commercial risk attended the launch of this enterprise. In order to attract a large number of signatories/investors, the entity required some corresponding protections. Second, INTELSAT was established with a core public service mission. That mission—providing global interconnectivity for international public telecommunications services—is embedded in INTELSAT's organic documents as a "public service obligation." To fulfill this public service obligation, INTELSAT was granted privileges and immunities consistent with an intergovernmental organization. Finally, because of its structure, INTELSAT's signatories were exposed to unlimited liability which could be partially mitigated by the grant of privileges and immunities.

The Federal Communications Commission (FCC) has indicated that Comsat, INTELSAT, and Inmarsat have enjoyed advantages due to the grant of privileges and immunities. In a 1997 proceeding, the FCC noted that Inmarsat and INTELSAT have "unique characteristics as treaty-based organization[s] that enable them to distort competition."[2] The FCC also found that Comsat, in its role as signatory, benefits from the immunities afforded INTELSAT and Inmarsat. The FCC rejected Comsat's arguments that it never claimed immunity, and stated that Comsat overlooked the benefits that it derived in its signatory capacity from the ISOs' immunities. The FCC concluded that

> [i]n that capacity, Comsat participates in business and commercial decisions protected by this immunity. We find that this extension of immunity provides Comsat a competitive advantage. It allows commercial decisions and activities to be conducted under a cloak of immunity unavailable to Comsat's competitors.[3]

In a subsequent proceeding, the FCC substantially reiterated its concern regarding the potential for anticompetitive conduct as a result of the ISOs' privileges and immunities. In that proceeding, the FCC found that

> [t]he immunity enjoyed by Comsat is a clear advantage over competitors that do not enjoy similar protection. Comsat's immunity protects Comsat in its broad signatory activities from suits based on antitrust, tort and contract claims. Moreover, as we have previously found, the INTELSAT activities of Comsat and the other signatories entail substantial commercial activities that are protected by their immunity. As the U.S. signatory, Comsat sits on the INTELSAT Board of Governors and Inmarsat Council and participates in decision making on all matters related to the commercial operation of a satellite system. INTELSAT's financial, legal, operational and strategic decisions provide the basis upon which Comsat offers service to U.S. consumers. These are the same type of commercial activities undertaken by Comsat's competitors with one key difference: Comsat's competitors have no immunity from suit and legal process for these types of activities and are subject to the U.S. competition laws, including antitrust laws.
>
> Absent an appropriate waiver of immunity, nothing would prevent Comsat from engaging in unilateral or coordinated anticompetitive activities. … Permitting one participant in a market to be shielded from liability for its anticompetitive business and commercial behavior while holding its competitors subject to liability for those acts is inconsistent with fair and competitive telecommunications markets and regulating in the public interest.[4]

The FCC allowed, however, that Comsat could make application to provide domestic service if such application included "an appropriate waiver of immunity from any suit." To date, there is no record that Comsat has made such application. There is no reason to assume that the FCC would grant INTELSAT direct access to the U.S. market with or without a similar waiver of its immunities. The issue of direct access is currently under consideration at the FCC.[5]

Neither INTELSAT, Inmarsat, nor their signatories have retained all of their privileges and immunities as the privatization of INTELSAT and Inmarsat has proceeded. Inmarsat's residual intergovernmental organization—responsible for monitoring Inmarsat's implementation of its global maritime distress and safety (GMDSS) function—retains its privileges and immunities. That residual intergovernmental entity, however, is not an operating service provider. Neither the privatized Inmarsat nor its earlier spin-off, ICO-Global, have privileges or immunities. As noted below, INTELSAT made a partial waiver of its privileges and immunities as to its relationship with the spin-off, New Skies. The U.S. government found that waiver to be sufficient in the broader context of the INTELSAT negotiations. Like ICO, New

Skies has no privileges or immunities. At this point, U.S. government representatives are unaware of any anticompetitive conduct resulting from ISO use of privileges and immunities.

It should be noted that under provisions of the Communications Satellite Act, three "instructional agencies"—NTIA, the FCC, and the Department of State's Office of Communications and Information Policy—are authorized to issue joint instructions to Comsat on a wide range of matters affecting the role of Comsat in INTELSAT.[6] Moreover, the instructional agencies have routinely been given access to signatory deliberations within INTELSAT's Board of Governors (and, formerly, in Inmarsat's Council). The role of the instructional agencies may be useful in blunting some of the anticompetitive threat inherent in privileges and immunities.

In the end, the impact of the grant of privileges and immunities cannot be clearly resolved. A reasonable person might conclude that the ISOs benefitted from their privileged status. Proving that case and proving that any benefit was conferred with an anticompetitive intent or effect, however, is a different matter. Moreover, it cannot be said that those who established the ISOs in legislation intended otherwise—never anticipating the development of robust competition or its consequences in global satellite communications.

Market Access

Market access is at the center of U.S. policy concerns related to international telecommunications, including satellite telecommunications. U.S. firms such as PanAmSat and Orion face significant barriers to providing international satellite services in many foreign markets. Although these barriers are gradually coming down, they are still a serious problem.

However, these barriers are largely a reflection of the power of foreign monopoly telecommunications providers. Although these monopoly providers are also signatories to INTELSAT, INTELSAT is not itself a source of these market access problems. To elaborate, INTELSAT provides *wholesale* satellite capacity to telecommunications providers in signatory countries, not the high-profit links to *retail* customers. Absent INTELSAT, a foreign monopoly service provider could simply substitute another source of wholesale satellite capacity and still retain its monopoly over sales of satellite services to retail customers.

For that reason, privatization of INTELSAT will not reduce either the incentive or the ability of monopoly foreign telecommunications providers to restrict access to their retail, end-user market—the market most sought by U.S. satellite services firms. (Although some conjecture that having additional competitors in the wholesale market might put pressure on foreign governments to open their local monopolies, such an effect is speculative.)

To be sure, privatization of INTELSAT is important for its own sake—for the benefits it will bring to satellite services users, providers, and investors. But privatization of INTELSAT will not provide a lever for opening the monopoly foreign markets that resist competitive entry. The problems of foreign telecommunications monopolies must be addressed directly, through bilateral negotiations or by enforcing and expanding market-opening multilateral arrangements such as the WTO agreement.

Barriers to market access may derive from legal, regulatory, economic, technical, and operational policies. Barriers may reflect policies instituted prior to the emergence of international telecommunications competition. Such barriers can be expected to have the effect of raising end-user prices, stalling deployment of new technologies and limiting end-user options. If barriers exist in an arena that favors an ISO and its signatories, the playing field becomes or remains uncompetitive.

The consequences of barriers to market entry were highlighted by the FCC in its 1998 rulemaking on Comsat's petition on nondominance:

> Legal barriers to entry in many countries make it difficult for a U.S. authorized carrier to offer switched voice service in a foreign market. Historically, the most significant entry barrier in international telecommunications has been obtaining an operating agreement with monopoly telecommunications service provider before providing service to a particular country. In the case of U.S. satellite service providers, obtaining the authority to provide service in a particular country, including authority to transmit and receive from an earth station within a country (sometimes referred to as landing rights), remains a significant legal barrier to entry.[7]

In the mid-1980s, the U.S. government advocated separate and competing (satellite) systems. In doing so, the United States encountered considerable hostility from ISO signatories, most of whom decided not to deal with any separate system. Initially, the separate systems were prohibited by U.S. policy from carrying basic voice traffic, preserving that market exclusively for the ISOs. The limitation on voice traffic, however, has since been removed. Separate systems have focused on development of the video market.

This segregation of voice and video markets remains a residual source of concern. In its filing with NTIA, PanAmSat noted that, while it can provide full-time video service in 129 countries, only eight countries allow PanAmSat to offer switched voice traffic. PanAmSat notes that it cannot offer any voice service in five global regions—Western Europe, Eastern Europe, North America, Central and South Asia, and the Middle East.[8] PanAmSat did not indicate whether it seeks to provide voice service in all these countries as a wholesaler (similar to INTELSAT) or as a retailer (similar to AT&T, MCIWorldcom, Sprint, and others in the United States). PanAmSat also cites ten countries (India, Argentina, Brazil, Colombia, Ecuador, Guatemala, Honduras, Nicaragua, Paraguay, and Pakistan) where INTELSAT, by practice, has been exempted from licensing fees or other cumbersome regulatory requirements to which PanAmSat is subject.[9]

INTELSAT remains a dominant satellite voice traffic carrier, but this appears to be more a historic artifact than the product of any continuing practice encouraged by INTELSAT. Although the voice traffic market is shrinking for satellite service providers (most traffic is now carried by submarine fiber optic cable),[10] that market can provide a platform of relatively steady (if low-margin) revenue sufficient to permit a further expansion of service into video and data markets. Unfortunately, the relationship between a monopoly operating company and its "regulator," in many countries, may perpetuate preferences for use of INTELSAT or fiber-optic capacity for which the national operating company has an ownership interest. The forces of global competition and World Trade Organization enforcement can be expected to reduce these incentives over time.

Comsat, in its comments to NTIA, states that "Whereas at one time COMSAT was virtually the only INTELSAT signatory that was *not* a government entity, today about 75 % of INTELSAT's ownership is held by companies that are fully or partly privatized. In fact, of those signatories with an ownership share of .5% or more, all but six are fully or partly private, and four of those six have announced plans to privatize in the near future."[11]

The ISOs have exercised market power in their treaty-derived technical coordination role with separate systems. When the INTELSAT agreement was written, parties were given the power to review "separate systems" to avoid significant economic harm to INTELSAT. Such coordination included reviews of the separate systems business plans to determine whether or not these competitors posed such a threat. Over the past nine years, the INTELSAT parties have eliminated the economic harm test. The technical coordination process, though occasionally contentious, is now conducted with little evident intent to use the process as a means of limiting competition.

It is clear that the separate systems faced formidable market access difficulties in the past. In recent years, however, these once-threatened enterprises have grown and become highly successful. Once small, both PanAmSat and Orion have become part of substantially larger enterprises (Hughes and Loral) and PanAmSat reported net revenues in 1998 of slightly more than $750 million, or about three quarters of INTELSAT's revenues and more than $100 million in excess of Comsat's 1998 net revenues.

In its filing with NTIA, Iridium identified two countries (Mexico and South Africa) where market access remains a problem.[12] The U.S. government will continue to pursue resolution of these problems. We note the April 7, 1999, statement reported in *Communications Daily* by Iridium's then-Chairman that "Iridium expects to win licenses to serve an additional 80 countries this year, increasing [the] total to 230 covering virtually every country except those that have been embargoed." This progress is important as Iridium's anticipated market access problems were central to many of the discussions surrounding Inmarsat's creation of ICO—a direct competitor to Iridium.

As telecommunications competition has emerged, international satellite communications has not been a priority arena for regulators or policymakers in other countries seeking to introduce competition. This is not necessarily a sign of regulator indifference, however. Rather, it seems to reflect a matter of simple priority and use of government resources in different countries. In fact, for 1998, the ISOs together had total revenues below $1.5 billion, a small portion of that year's estimated $26 billion in revenues for satellite communications services.

For many countries, participation in the ISOs has historically represented a minuscule fraction of the national operator's telecommunications revenue. For instance, except for Norway's investment in Inmarsat, no European signatory to the ISOs owned more than ten percent of either ISO. In most cases, European ownership has been far closer to five percent or lower. In addition, many European operators (and, increasingly, operating companies from other parts of the globe) made significant investments in undersea cable as the preferred technology for voice and data communications. In addition, more and more ISO signatories are finding investment opportunities in non-ISO satellite communications enterprises.

Separate from the question of foreign market access for competing (non-INTELSAT) satellite systems is that

of direct access to the INTELSAT system for non-signatory customers (communication carriers and end-users). There are four options for direct access that permit nonsignatory operators and users to obtain technical data or space segment capacity directly from INTELSAT rather than through INTELSAT signatories:

- Level One direct access permits customers to receive technical and operational information.
- Level Two direct access permits customers to meet with INTELSAT management and staff regarding INTELSAT tariffs, space segment availability, and other related commercial considerations.
- Level Three direct access permits customers to enter into contractual arrangements with INTELSAT for ordering, using, and paying for INTELSAT space segment at the same rate paid by signatories.
- Level Four direct access permits customers, in INTELSAT member countries, to make capital investments in INTELSAT in proportion to their space segment utilization just as signatories do.[13]

While the United States has not allowed for direct access, ninety-four other INTELSAT countries have instituted either Level Three or Level Four direct access of some nature. Although the Clinton Administration believes that direct access is procompetitive, it recognizes that direct access implemented elsewhere has been designed to address a problem that does not exist in the United States, e.g., control of all international facilities and services by a single, dominant carrier.[14]

In its comments to NTIA, the Satellite Users Coalition (AT&T, MCI WorldCom, and Sprint) complain that the absence of direct access in the United States, deliberately helps foreign carriers:

> Another unfortunate side effect of Comsat's monopoly is that many of its U.S. customers are beginning to route INTELSAT traffic through the facilities of foreign signatories of INTELSAT (such as Teleglobe, the Canadian signatory). This routing is inefficient, bypasses the U.S. earth station facilities in which U.S. carriers have large investments, and gives U.S. carriers a strong incentive to build future INTELSAT earth stations in other countries. The result is that investment in the United States decreases and U.S. jobs move abroad.[15]

In a broader context, the Department of Commerce is persuaded that, where market barriers exist, the World Trade Organization's (WTO) Group on Basic Telecommunications (GBT) agreement provides broad protection to address such problems. Admittedly, as PanAmSat points out in its filing with NTIA, neither the Russian Federation nor the Peoples' Republic of China belong to the WTO. While acknowledging that the Russian Federation and the Peoples' Republic of China represent a significant portion of the world's potential telecommunications users, their absence from or participation in the WTO is beyond this report's ambit. PanAmSat also notes that only sixty-five of INTELSAT's 139 signatory countries committed to implementing the WTO Reference Paper on Regulatory Principles.[16]

On the other hand, the INTELSAT signatory countries committing to the reference paper, together with other countries committing to it, represent approximately 90 percent of the world's basic telecommunications revenues. The reference paper is particularly important since it commits participating countries to establish independent regulatory bodies, assures foreign operating companies the ability to interconnect with networks in other countries at fair prices, forbids anticompetitive practices such as cross-subsidization, and requires regulatory and licensing transparency for basic telecommunications services.

Where INTELSAT was once nearly the only provider of international satellite services—affording it a degree of control over market access opportunities—the market is now marked by other global service providers as well as numerous regional and national satellite systems. Planned systems suggest that this pattern will continue with new services to be provided by well-funded multinational organizations such as Teledesic, Spaceway, Cyberstar, and Skybridge, among others.

The issue of market access is likely to become less important as the newer systems expand their multinational character, engaging capital, marketing, and technical support from other firms. Thus, where there were once distinct competitive advantages for the ISOs and their signatories, the forces of competition and technology have reduced those advantages. As further privatization of INTELSAT is implemented, that advantage is likely to disappear altogether.

Preferential Tax Treatment

INTELSAT is exempt from federal, state, and local taxation. Comsat is not. Other signatories are subject to the taxation regime of their sovereign state. State-owned post, telephone, and telegraph (PTT) operating companies are generally tax exempt. The tax treatment varies according to the code of different states. There is no evidence suggesting preferential or advantageous national tax treatment for ISO signatories simply because of their status as ISO signatories.

National Contracts—Preference for ISOs

There is little data available upon which any conclusion may be drawn regarding any preference given to the ISOs or their signatories. No embassy reported any indication of improper preference although it may be assumed that where state-owned or monopoly providers exist they are recipients of such contracts.

Similarly, there is no evidence that the ISOs have received undue preference in the award of contracts from the U.S. government.

Access to Spectrum and Orbital Slots

In the Comsat Non-Dominant Order, the FCC took note of INTELSAT's unique and favorable position in acquiring orbital slots and spectrum and stated that it agreed "with PanAmSat and other commenters that Comsat through INTELSAT has a significant competitive advantage in obtaining spectrum and orbital locations."[17]

Comsat took exception to PanAmSat's assertions but the FCC summarized the matter in the following fashion:

> Comsat's statement, however, incorrectly implies that the Commission exercises its responsibilities as the notifying administration on behalf of INTELSAT in the same manner as it does on behalf of U.S. licensees. As the notifying administration on behalf of INTELSAT, the Commission does not assert any regulatory authority over INTELSAT's decision to register with the ITU (International Telecommunications Union) for spectrum and orbital locations. The Commission only acts as a "copper wire" or "mail box" in officially submitting the filings to the ITU on INTELSAT's behalf. There is no regulatory review of INTELSAT's submissions; they are often transmitted to the ITU the day after being submitted to the Commission by INTELSAT. In comparison, ITU submissions on behalf of applicants for U.S. licenses are subject to rigorous review in connection with the licensing process. Comsat's argument, therefore, does not address the concern raised by PanAmSat. INTELSAT is able to obtain spectrum and orbital locations through the ITU without being subject to any national regulatory review. We conclude that this is a competitive advantage over U.S. licensees.[18]

Advantageous access to the spectrum may be attributed to the procedural advantages of the ISOs and the fact that the ISOs were the original market entrants and, therefore, had first choice of the available resources. For instance, Iridium states that even today the privatized Inmarsat has access to nearly half of the 66 megahertz (MHZ) of the global Mobile Satellite System (MSS) L-band—thereby occupying more spectrum than all the other MSS systems now in existence or planned. In addition, according to Iridium, Europe has already assigned all 30 MHZ of the 2 gigahertz (Ghz) MSS global spectrum available until January 1, 2005, to Inmarsat and its affiliate ICO. Taken together, this means that Inmarsat and ICO will control approximately 75 percent of the global MSS spectrum available until 2005. By comparison, Iridium itself only has access to 5.15 MHZ, while Globalstar, Ellipso, and Constellation will share a total of 27.85 MHz.

Thus, the ISOs have been able to acquire preferred access to orbital slots and associated spectrum frequency. With privatization, however, it is expected that the former ISOs will conduct themselves as normal corporate entities and, correspondingly, be treated the same as any other satellite service provider seeking regulatory approval for space systems. In this context, it should be noted that INTELSAT deregistered five orbital slots, and transferred others, following the creation of its spinoff, New Skies.

Conclusion

This chapter has briefly reviewed the advantages identified in IAFCA as important for examination. The review suggests that the ISOs have, in the past, had advantages through use of their privileges and immunities; by market access control by many of their signatories; and by their ease of access to spectrum frequency and orbital slots. Data is not available to further analyze the extent of advantages that may have been derived from other issues identified by the Committee on Commerce for review, such as tax advantages, advantages in regulatory treatment, and advantages through government ownership or government contracts.

Areas where advantages have existed appear to be diminishing. The reason that these advantages are disappearing is the result of the combined effect of ISO privatization, global and national trends in telecommunications liberalization and competition, the WTO/GBT agreement, and ongoing attention of U.S. industry and government.

It is important to distinguish between the ISOs, their signatories, and national governments. The ISOs themselves were established in an entirely different era and have been committed to the dual purposes of providing a communications service on a commercial basis while also fulfilling certain public service obligations.

The ISOs provided a very small, often negligible increment of revenue to the signatories, with the exception of Comsat. Conduct by the signatories during, for instance, the emergence of separate systems, probably reflected their desire to preserve the status quo, than any willful intent by the senior management of a signatory to retain control of a market that produced minor revenues.

Thus, we expect that the advantages that have been afforded to INTELSAT in the past have withered away, or will do so with privatization.

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[1]64 *Fed. Reg.* 17625 (1999).

[2]Amendment of the FCC's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Report and Order, 12 FCC Rcd 34094, para. 125 (1997).

[3]Id.

[4]Comsat Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private-Line, and Video and Audio Services, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, para. 161 (1998) ("Comsat Non-Dominant Order").

[5]See Direct Access to the INTELSAT System, Notice of Proposed Rulemaking, IB Docket No. 98-192, FCC 98-280 (rel. Oct. 28, 1998).

[6]See, e.g., Communications Satellite Act of 1962, Pub.L.No. 99-33, Section 146, 99 Stat. 425 (1985).

[7]Comsat Petition for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, para. 82 (1998).

[8]See Comments of Panamsat Corporation at 9 (May 12, 1999). Comments are available at NTIA's website http://www.ntia.doc.gov.

[9] Id. at 8.

[10]In its comments, INTELSAT provides a summary of growth in the undersea fiber optic cable voice traffic. See Comments of INTELSAT at 6 (May 12, 1999). Comments are available at NTIA's website, http://www.ntia.doc.gov.

[11]See Comments of Comsat at 20 (May 12, 1999). Comments are available at NTIA's website, http://www.ntia.doc.gov.

[12]See Comments of Iridium LLC and Motorola, Inc at 6. Comments are available at NTIA's website, http://www.ntia.doc.gov.

[13]Direct Access to the INTELSAT System, Notice of Proposed Rulemaking, IB Docket No. 98-192, FCC 98-280, para 9 (rel. Oct. 28, 1998).

[14]See Comments of Comsat Corporation at 18. Comments are available at NTIA's website http://www.ntia.doc.gov.

[15]See Letter from Satellite Users Coalition to Milton Brown, NTIA, dated May 12, 1999, Attachment at 4. (Attachment to the Letter is the Joint Testimony of AT&T, MCI WorldCom and Sprint ("Satellite Users Coalition") before Senate Committee on Commerce, Science, and Transportation Subcommittee on Communication, April 30, 1999.

[16]See Comments of PanAmSat Corporation at 22 (May 12, 1999). Comments are available at NTIA's website http://www.ntia.doc.gov.

[17]See Comsat Non-Dominant Order at para. 92.

[18]Id.